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FOOD IN PRISON: AN EIGHTH AMENDMENT VIOLATION OR PERMISSIBLE
PUNISHMENT?

By Natasha Clark

A Thesis Submitted in Partial Fulfillment
Of the Requirements for the
University Honors Program

Department of Criminal Justice

The University of South Dakota

Graduation May 2020

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ABSTRACT

FOOD IN PRISON: AN EIGHTH AMENDMENT VIOLATION OR PERMISSIBLE PUNISHMENT?

Natasha Clark

Director: Prof. Sandy McKeown, Associate Professor of Criminal Justice

This piece analyzes aspects such as; Eighth Amendment provisions, penology, case law, privatization and monopoly, and food law, that play into the constitutionality of privatized prisons using food as punishment. Prisoners have protection from excessive bail and fines and from cruel and unusual punishment, as per the 8th Amendment; however, deprivations such as restricted diets and harm caused by them is only a valid violation if the prisoner can prove deliberate indifference. Privatization of the prison industry has led to reduced quality, choice, and diversity in areas such as food, which comes at a detrimental cost to prisoners. Serving Nutraloaf, completely withholding food, or serving rotten food to prisoners who allegedly violate institutional rules is an odd, unusual punishment often found within prisons operated by those monopolies. This wanton disregard for prisoners' health can be seen in numerous complaints regarding to food and nutrition, filed by those suffering at the benefit of the prison institution's gain. In whole, prisoners in the care of privatized institutions face the harsh reality that food is no longer the source of sustenance, rather it becomes the provenance of an unusual punishment in the face of privatization; therefore, a potential violation of 8th Amendment provisions.

KEYWORDS: Eighth Amendment, Privatization, Prison, Food, Violation, Penology

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ACKNOWLEDGMENTS

I would like to express my appreciation for Dr. McKeown's constant pouring of motivational talks and encouragement throughout the course of this project and her assistance in restructuring this piece at the end of my senior year. Without her reassurance and guidance, I would have never completed this piece. I would also like to thank Dr. Horton for promptly agreeing to become a member of my committee upon restructuring, while inspiring me to look at privatization's role in prison food as punishment. Finally, thank you to Dr. Mrozla for jumping on board toward the end of the writing process and being enthusiastic about my project, despite his large research load. Furthermore, many thanks are owed to the Honors Department for being understanding and flexible with thesis deadlines during the unprecedented statewide closures of universities.

CHAPTER ONE

INTRODUCTION

A number of factors come into consideration when analyzing the constitutionality of using food as a punishment in prison including: Eighth Amendment provisions; penology; respective case law; privatization of prisons; and food law or policies in prison. These aspects derive characteristics from one another when looking at what passes as standard treatment of food, as well as punishment of the incarcerated population. Privatization of the prison industry results in institutional policies that allow for the withholding of food or the plating of poor quality food, to be served to prisoners. Such policies that break the minimum standard of treatment for prisoners violate the Eighth Amendment in relation to the interpretations of provisions which include nutrition as a cruel and unusual punishment. The resulting state of food in prisons is an outcome of courts allowing private corporations to govern their own realms; yet, the end result is not efficient food service. Penal policy in privatized prisons reflects much of the same laissez faire approach from the courts. An effect of this is seen in how many prisons can get away

with using food as a pseudo-punishment, without labeling it punitive. Claims of Eighth Amendment violations have to be centered on punitive measures. Unfortunately, this means that pseudo-punishments are not technically violations. Yet, in some cases, food was found to be an unconstitutional method of punishment. To understand how food has evolved from a source of sustenance to a provenance of punishment one must look at all of the above factors.

Privatization of prisons(outsourcing government contracts to run prisons to private corporations) allows for the ability to cut corners— slashing food cost by enlisting companies such as Aramark to supply and serve daily meals at a reduced cost; therefore, putting more money into the pockets of the prison industry.¹ The padded wallets of the industry comes at the cost of those in its care. As a result of privatization, reduced oversight and lack of accountability are quite frequent.² This starts a chain reaction, leading to reductions in standards, relations between workers and the incarcerated, and even an easier

¹ Gibson-Light, Michael. p. 203-204.

² See articles: Perkins, Tom. "Something Still Stinks in Michigan and Ohio's Prison Kitchens." Detroit Metro Times. Detroit Metro Times, October 22, 2019. <https://www.metrotimes.com/detroit/something-still-stinks-in-michigan-and-ohios-prison-kitchens/Content?oid=2396672>;

Geraghty, S. "Failure to provide adequate nutrition to people in the Gordon County Jail [Letter to Sheriff Mitch Ralston]." Southern Center for Human Rights, Atlanta, Georgia. (2014, October 28) Retrieved from <https://www.schr.org/files/post/files/SCHR%20to%20Sheriff%20Ralston%2010%2028%2014.pdf>;

Joe Fassler, Claire Brown. "Prison Food Is Making U.S. Inmates Disproportionately Sick." The Atlantic. Atlantic Media Company, December 27, 2017. <https://www.theatlantic.com/health/archive/2017/12/prison-food-sickness-america/549179/>; and,

Gibson-Light, Michael. "Ramen Politics: Informal Money and Logics of Resistance in the Contemporary American Prison." *Qualitative Sociology* 41, no. 2 (2018): 199-220. p. 209

route for drug smuggling.³ Privatization of the prison realm has led to non-competing, geographic monopolies, Corrections Corporation of America (CCA) and the GEO Group, which control 74% of the private prison market in the United States.⁴ Not only that, these two companies spent \$45 million on campaign contributions and anti-reform lobbyists to safeguard their profits of \$2.7 billion, ensuring the lock up of citizens of the United States.⁵ These contract holders are profiting off of prison contracts, on the premise of efficiency, all the while disregarding standards of nutrition and treatment of prisoners. Considering the fact that there is no competition, monopolies are able to evade the pressures that would force them to meet higher standards. Monopolization and policies that reflect corporations' self-interests inevitably lead to reduced quality, diversity, and choice in aspects such as food for the prison. Not surprisingly, feeding prisoners only bread and water and directing their hunger towards for-profit convenience foods, forces a disproportionately marginalized population to starve or eat toilet paper for survival.^{6, 7} This practice,

³ Perkins, Tom. "Something Still Stinks in Michigan and Ohio's Prison Kitchens." Detroit Metro Times. Detroit Metro Times, October 22, 2019.
<https://www.metrotimes.com/detroit/something-still-stinks-in-michigan-and-ohios-prison-kitchens/Content?oid=2396672>. Paragraph 2.

⁴ Price, Byron Eugene., and John Charles. Morris. *Prison Privatization: The Many Facets of a Controversial Industry*. Vol. 1. Santa Barbara, CA: Praeger, 2012. p. 47.
Retrieved from https://books.google.com/books?id=zA9VB--EDUsC&printsec=frontcover&source=gbg_summary_r&cad=0#v=onepage&q&f=false

⁵ "Private Prison Industry: Corrections Corporation of America & GEO Group." Enlace: Organizing for Racial and Economic Justice. Accessed April 11, 2020.
<https://www.enlaceintl.org/cca-and-geo>.

⁶ Geraghty, S. "Failure to provide adequate nutrition to people in the Gordon County Jail [Letter to Sheriff Mitch Ralston]." Southern Center for Human Rights, Atlanta, Georgia. (2014, October 28) Retrieved from
<https://www.schr.org/files/post/files/SCHR%20to%20Sheriff%20Ralston%2010%2028%2014.pdf>

⁷ Gibson-Light, Michael. Pages 203-204.

although not considered punishment under traditional definitions, is a cruel punitive-like opportunity to keep prisoners controlled.

Distinguished from the general population's regulation on food, food laws in prison are modeled after prison law and policy, not nationwide standards of practice. An unfortunate outcome of this modeling structure is that monopolies—which essentially own the prison—have a strong foothold in prison policy.⁸ The policies that result from this complex relationship are often sub-par in comparison to nationwide criteria for preparation, sanitation, and serving food.⁹ This leads to the reduced quality of food in prison that broadly stereotypes life in prison. Not only that, but foodborne illnesses, due to prison standards, make up a disproportionate amount of the annual cases reported to the CDC, in fact they are six times more likely to get a food related illness than those not incarcerated.^{10,11} But with most courts using a hands-off approach to managing the operations in prisons,¹² little to nothing is done to amend those statistics or conditions.

⁸ Naim, Cyrus. "Prison Food Law." Leadership Enterprise for a Diverse America at Harvard. Food & Drug Law. (Spring, 2005). Retrieved from <https://dash.harvard.edu/bitstream/handle/1/8848245/Naim05.html?sequence=2&isAllowed=y> Paragraph 1 and 2 in "Prison Food Law Today."

⁹ Joe Fassler, Claire Brown. "Prison Food Is Making U.S. Inmates Disproportionately Sick." The Atlantic. Atlantic Media Company, December 27, 2017. <https://www.theatlantic.com/health/archive/2017/12/prison-food-sickness-america/549179/>.

¹⁰ Joe Fassler, Claire Brown. "Prison Food Is Making U.S. Inmates Disproportionately Sick." The Atlantic. Atlantic Media Company, December 27, 2017. <https://www.theatlantic.com/health/archive/2017/12/prison-food-sickness-america/549179/>.

¹¹ Marlow, Mariel A., Ruth E. Luna-Gierke, Patricia M. Griffin, and Antonio R. Vieira. "Foodborne Disease Outbreaks in Correctional Institutions—United States, 1998–2014." *American Journal of Public Health* 107, no. 7 (July 2017): 1150–56. <https://doi.org/10.2105/ajph.2017.303816>. Pages 1154-1155.

¹² *Bethea v. Crouse*, 417 F. 2d 504 (10th Cir. 1969). Retrieved from <https://casetext.com/case/bethea-v-crouse>

Prisons remain hotspots of infection, and when left in this state of unkempt, violate prisoners' right of protection from cruel and unusual punishment, as set by accepted standards. This is no reasonable treatment for a population that is effectively isolated from the rest of the individuals who care about their well-being.

Historically, punishment of prisoners has been justified through four principles or goals. These principles include retribution, deterrence, rehabilitation, and incapacitation.¹³ As the pendulum of accepted goals of the criminal justice system swings back and forth in societal views, different principles are focused upon. Currently, it seems that the pendulum is swinging toward a more reformatory/rehabilitative approach; yet, many of the policies and practices in place reflect retributive, pay for what one did, beliefs of punishment from the 1990's.¹⁴ Logically speaking, the trend in becoming more rehabilitative in punishments should reflect in the changing of current policies; however, there seems to be a break in that movement when it comes to food in prison. The disconnect occurs when looking to the intent behind actions that are skirting the label of punishment, while combing through Eighth Amendment violation claims. Food may play the role of punishment for prisoners, but governmental actors do not label it to be a punishment. This is where the difficulty in determination occurs. The situation begs the ultimate question, "is an action a punishment only if it was intended to be a punishment by those carrying it out?"¹⁵ There is a valid

¹³ Templeton, Laura J., and Timothy F. Hartnagel. "Causal Attributions of Crime and the Public's Sentencing Goals." *Canadian Journal of Criminology & Criminal Justice* 54, no. 1 (January 2012): 46.

¹⁴ Phelps, Michelle S. "The Place of Punishment: Variation in the Provision of Inmate Services Staff across the Punitive Turn." *Journal of Criminal Justice* 40, no. 5 (2012): 349.

¹⁵ Nathan, Christopher. "PRINCIPLES OF POLICING AND PRINCIPLES OF PUNISHMENT." *Legal Theory* 22, no. 3-4 (12, 2016): 186.

argument which could be made on the part of those incarcerated. The argument is relative to the fact that prisoners still felt the harsh results of a punitive-like measure—regardless of the hesitancy to label the measure as punishment.¹⁶

The Eighth Amendment of the Constitution provides for protection from cruel and unusual punishment; yet, correctional facilities have historically blurred the lines with a varying array of punishments and control mechanisms of discipline— including food. Corporations which insist that as long as prisoners are being fed and have the opportunity to supplement their nutrition with commissary at an inflated rate¹⁷, they have satisfied the basic needs as defined by interpretations of the Eighth Amendment from court cases.¹⁸ Instituting restricted diets of Nutraloaf and raw cabbage, or even bread and water, seems to be an additive form of punishment within prison.¹⁹ Not only are the diets bland and unappetizing, they have a tendency to produce unwanted side effects such as diarrhea, constipation (depending on the recipe of the loaf), and weight loss.²⁰ This tactic of using food as a retributive form of punishment produces a highly unfavorable result overall.

In a sense, it seems that the Eighth Amendment acts as the gatekeeper for the courts, validating or dismissing claims of deteriorating prison food. The determinations are largely dependent on the platform set by privatized corporations, as courts tend to rule in a hands

¹⁶ Nathan, Christopher. "PRINCIPLES OF POLICING AND PRINCIPLES OF PUNISHMENT." *Legal Theory* 22, no. 3-4 (12, 2016): 187.

¹⁷ Gibson-Light, Michael. "Ramen Politics: Informal Money and Logics of Resistance in the Contemporary American Prison." *Qualitative Sociology* 41, no. 2 (2018): 199-220. p. 209

¹⁸ *Farmer v. Brennan*, 511 U.S. 825 (1994). Retrieved from <https://supreme.justia.com/cases/federal/us/511/825/>

¹⁹ see cases: *Phelps v. Kapnolas*, 308 F.3d 180,186 (2002), and *Myers v. Milbert*, 281 F. Supp. 2d 859, 865-66 (N.D.W. Va. 2003)

²⁰ see cases: *Phelps v. Kapnolas*, 308 F.3d 180,186 (2002), and *Myers v. Milbert*, 281 F. Supp. 2d 859, 865-66 (N.D.W. Va. 2003)

off fashion, in relation to prison contracts. Those incarcerated are serving their sentence, which is their societally acceptable punishment, and are faced with harsh treatment. Manipulation of food allowances and less-than standard nutrition plagues them, and yet their claims fall on deaf ears. If prisoners cannot prove deliberate indifference, recklessness, and “serious” harm done then their claim is not valid, despite the punitive-like actions taken against them. This thesis will take a look at the moving parts behind food as punishment in prison. Included in this piece on food in prison are as follows: court cases determinations based on Eighth Amendment provisions; what consists as punishment based on penology; minimum standards of treatment for prisoners; privatization of the prison industry; subcontracting services; and, food law in prison. Combining information from each of these sections allows for the bigger picture to be seen. Food is used as a punitive-like measure, potentially violating prisoners’ rights; yet, little will be done based on old definitions of punishment and an unwillingness of the courts to intervene at many junctures.

CHAPTER TWO

ASPECTS OF PRIVATIZATION IN PRISON

SECTION A

PRIVATE PRISON COMPANIES

In the last two decades, the prison system has become an industry ripe for the taking, with mass incarceration bringing it to the market for increased privatization.^{21, 22} Cutting back on budgets despite a population swell, prison officials looked to cheaper options for running their institutions.²³ Not only was there incentive to shift the burden of cost to the prisoner for things like utility fees, room and board, medical care, and other various amenities; but, there was the element of frugality in anything the prison provided to them, producing, “a prison system that is overcrowded, underfunded, and offering fewer and poorer quality services.”²⁴ Frugality as a way to sustain profit results in “low pay,

²¹ Aviram, Hadar. “The Correctional Hunger Games.” *The ANNALS of the American Academy of Political and Social Science* 664, no. 1 (2016): 260–79.
<https://doi.org/10.1177/0002716215599938>. Page 274.

²² Western, Bruce. “Punishment and Inequality in America.” New York, Russell Sage Foundation, 2006. Page 30.

²³ Gibson-Light, Michael. Page 203.

²⁴ Gibson-Light, Michael. Page 203.

limited staff training, and other cost-cutting measures” that lead to unmet needs of those incarcerated as well as security issues for all involved.²⁵ This is a major issue especially when private prisons hold a considerable amount of the incarcerated population as well as federal immigration detainees, as private companies manage or own 75-percent of the detention centers in the United States.^{26,27}

The two largest private companies CoreCivic (formerly Corrections Corporation of America) and the GEO Group hold a monopoly in the private prison industry. Looking specifically at their geographic location, CoreCivic and the GEO Group hold premiere monopolies which are not in competition with one another. CoreCivic has listed 122 facilities under their management related to corrections,²⁸ while the GEO Group’s operation cites the management and ownership of 129 facilities²⁹ Together, they amass near 190,000 beds of outsourced prisoners, at the benefit of those who cut corners^{30,31} The contracts with governmental agencies for housing the incarcerated population are the source of their revenue, so they lobby for policies that benefit their self-interests.³² Paying

²⁵ Krisberg, Barry, Susan Marchionna, and Chris Hartney. “Chapter 15: The Privatization of Corrections.” *American Corrections: Concepts and Controversies*. (2019). SAGE Publications. 364-391. Page 365.

²⁶ Krisberg, Barry, et. Al. Pages 365-367.

²⁷ Dymond Green, Tala Hadavi. “Why Big Banks Could Be Killing Private Prisons.” CNBC. CNBC, January 2, 2020. <https://www.cnbc.com/2020/01/02/why-private-prisons-geo-group-and-corecivic-are-struggling-under-trump.html>.

²⁸ CoreCivic. “Facilities.” CoreCivic. Accessed April 17, 2020. <https://www.corecivic.com/facilities>.

²⁹ “Our Secure Services Locations.” GEO Group. Accessed April 17, 2020. <https://www.geogroup.com/Locations>.

³⁰ “Our Secure Services Locations.” GEO Group.

³¹ CoreCivic. “Facilities.”

³² “Gaming the System: How the Political Strategies of Private Prison Companies Promote Ineffective Incarceration Policies.” Justice Policy Institute. June 2011. http://www.justicepolicy.org/uploads/justicepolicy/documents/gaming_the_system.pdf. Page 2.

out to influence public policy related to corrections, law enforcement, immigration, and court processes or decisions is one business venture that these giants engage in for the success of their companies' contracts.³³

Meeting previous demands in the prison industry is a picture that many private prison companies would like to portray; yet, with their political dealings they are instead creating a larger market to benefit from with pro-incarceration policies.³⁴ Just looking at a decade ago, in 2010, CoreCivic made half of their revenue (\$838.5 million) from state contracts and another 43 percent from federal contracts, when just the year prior their company made \$46 million total.³⁵ Political connections in CoreCivic were evident from the start with its founders Tom Beasley, Dr. Crants, and Don Hutto networking with investors in the Tennessee Republican Party and the American Correctional Association to create the first private prison corporation in the United States.³⁶ Another giant, the Geo Group made 66 percent (\$842 million) of its 2010 revenue from corrections contracts.³⁷

Hundreds-of-thousands to millions of these dollars seem to make their way into the pockets of those with power in the public policy realm, advocating for pro-incarceration

³³ "Gaming the System..." June 2011. Page 2.

³⁴ "Gaming the System..." June 2011. Page 3.

³⁵ "Gaming the System..." June 2011. Pages 6-7.

³⁶ "Gaming the System..." June 2011. Page 7.

³⁷ "Gaming the System..." June 2011. Page 8.

bills and policies.^{38, 39, 40} These policies, in turn, create more need for beds in the prison institutions, which are frequently owned by these major private prison companies. The resulting boom from public policies rejecting prison reform sets more prisoners in the hands of private companies that want to exploit them for a profit, while cutting cost and shifting it to the incarcerated population.

Privatization of the prison industry has gone too far. It is no longer a means for efficiency that gives tax-payers a break from footing the bill for the prison population. Instead, it profits off of the free population and no longer plays the role of protective contractor to the incarcerated population. Instead it enslaves the incarcerated population, while exploiting them for their basic needs. Refusing to spend the full allowance of budget on each prisoner is a misuse of funds and needs to be addressed. Ramping up cost on commissary items and phone calls to a population that is already disadvantaged in those realms is cruel. Prison labor is often a way private contractors keep their profit up. What little they pay out will eventually be returned through purchasing inflated items. Paying well below standard minimum wage, most of the time less than a dollar per hour, creates a form of slavery in prison. This in itself is detrimental, because if one is a slave working hours on end for basic necessities, one could assume that is torturous.

³⁸ “Private Prison Company GEO Group's Pay-to-Play.” Campaign Legal Center. Accessed April 17, 2020. <https://campaignlegal.org/cases-actions/private-prison-company-geo-groups-pay-play>.

³⁹ Pauly, Madison. “Private Prison Companies Poured Record Cash into the 2018 Elections.” Mother Jones, November 12, 2018. <https://www.motherjones.com/politics/2018/11/private-prison-companies-poured-record-cash-into-the-2018-elections/>.

⁴⁰ “For-Profit Prisons: Long-Term Contribution Trends.” OpenSecrets.org. Accessed April 17, 2020. <https://www.opensecrets.org/industries/totals.php?cycle=2018&ind=G7000>.

Going back to Ronald Reagan's presidency, it was understood that privatizing the prison industry would save the tax-payers' money through reduction in spending based on efficiency.⁴¹ The sheer amount of such large profits while providing low quality services and food would suggest otherwise. These monopolies have the financial ability to better serve the incarcerated population; yet, they choose substandard ways of providing to benefit themselves at the cost of prisoners' well-being. Reevaluating and taking action to amend such contracts that fail to meet standards, yet net profit, should be a primary step in prison reform. Logically following, this step could possibly enhance prison conditions and reduce spending on the government side of the system.

In sum, the current method of privatizing the prison industry is failing not only those incarcerated, but the tax-payers funding prison corporations as well. Money that is supposedly going toward the housing and maintenance required to imprison people is actually going into the pockets of politicians and interest groups. Prison reform is needed to correct the issues associated with privatizing the industry and along with it bettering the treatment of the incarcerated population.

⁴¹ Tingle, Michal Laurie. "Privatization and the Reagan Administration: Ideology and Application." *Yale Law & Policy Review* 6, no. 1 (1988): 230. Accessed May 17, 2020. www.jstor.org/stable/40239280.

CHAPTER TWO

SECTION B

PRIVATE FOOD CONTRACTS

The sentiment of cost reduction was of course reflected in prison food service where, “reducing the amount and quality of food served to people in prison” was the main motivator behind hiring private food providers.⁴² Yet, most prisons *can* afford to provide properly adequate meals to its entire incarcerated population, but instead, they make the choice to save money by cutting corners.⁴³ Lowering cost, prisons subcontract food services to companies like Aramark Correctional Services and Trinity Services group, which hold a majority of the privatized prison and jail food industry.⁴⁴

⁴² Gottschalk, 2006, p. 244, Gottschalk, Marie. 2006. The prison and the gallows. New York: Cambridge University Press.

⁴³ Reutter, David, Gary Hunter, and Brandon Sample. “Appalling Prison and Jail Food Leaves Prisoners Hungry for Justice: Prison Legal News.” Appalling Prison and Jail Food Leaves Prisoners Hungry for Justice | Prison Legal News. Prison Legal News, April 15, 2010.
<https://www.prisonlegalnews.org/news/2010/apr/15/appalling-prison-and-jail-food-leaves-prisoners-hungry-for-justice/>.

Privatization and the meager oversight resulting from it are hazardous to those incarcerated as seen in numerous incidents where private contractors, “served food tainted by maggots, knowingly served rotten meat, ordered inmates to serve food pulled from the garbage, handed out food on which rats nibbled, and served moldy food.”⁴⁵ In multiple incidences in Georgia, the incarcerated population have resorted to eating toilet paper and toothpaste, while drinking extreme amounts of water to stifle their hunger pains.⁴⁶ Not only are there worries with the quality, quantity, and state of food with privatization, there is a lack of accountability throughout the contracted company, resulting in various smuggling of contraband and “employees having sexual contact with inmates.”⁴⁷

Take for instance the contract food service provider Aramark. Aramark has a history of acquisitions and mergers that have led to it having a monopoly in partnership with SYSCO, being the top provider for contracted services for prisons.^{48,49} Aramark alone

⁴⁴ Reutter, David. “Prison Food and Commissary Services: A Recipe for Disaster: Prison Legal News.” Prison Food and Commissary Services: A Recipe for Disaster | Prison Legal News, August 2018. <https://www.prisonlegalnews.org/news/2018/aug/4/prison-food-and-commissary-services-recipe-disaster/>.

⁴⁵ Perkins, Tom. “Something Still Stinks in Michigan and Ohio's Prison Kitchens.” Detroit Metro Times. Detroit Metro Times, October 22, 2019. <https://www.metrotimes.com/detroit/something-still-stinks-in-michigan-and-ohios-prison-kitchens/Content?oid=2396672>. Paragraph 2.

⁴⁶ Geraghty, S. (2014, October 28). Failure to provide adequate nutrition to people in the Gordon County Jail [Letter to Sheriff Mitch Ralston]. Southern Center for Human Rights, Atlanta, Georgia. Retrieved from <https://www.schr.org/files/post/files/SCHR%20to%20Sheriff%20Ralston%2010%2028%2014.pdf>

⁴⁷ Perkins, Tom. Paragraph 2.

⁴⁸ “History.” Aramark. Accessed April 30, 2019. <https://www.aramark.com/about-us/history>.

⁴⁹ “Composite and Conformed Master Distribution Agreement Between Sysco Corporation and Aramark Food and Support Services Group, Inc.” January 2, 1992. Retrieved from: <https://www.onecle.com/contracts/aramark/sysco.distrib.shtml>

serves around 500 correctional facilities,⁵⁰ but its quantity of contracts does not signify quality. A daily allowance of \$1.71 per each prisoner, makes for an environment of hiring low-wage employees, and lower quality soy products eliminating most meat products with disastrous results.⁵¹ Several incidents have made headway stemming from their mishandling of food in prison and school settings. One of which happened in a Michigan DOC facility, where food was removed from the garbage and reheated in order to serve remaining inmates even though other prison workers refused to serve it.⁵² Aramark's response was to fire one of the many employees at that Saginaw Correctional Facility.⁵³ Another notable incident within the Michigan DOC contract was when rodent infested caked was re-frosted to pass line inspection, and then served to those incarcerated.⁵⁴ Beyond food issues, an advocacy group, Progress Michigan, has found that, "The Aramark prison food service contract has resulted in drug smuggling, sexual contact between employees and inmates, an attempted murder-for-hire plot."⁵⁵

In retaliation for poor quality food and their own exploitation, prisoners at a correctional facility in Kentucky rioted after peaceful protests for food quality were

⁵⁰ Aramark Corporation. Form 10-K: Annual Report 2009. *United States Securities and Exchange Commission*. Retrieved from:
<https://www.sec.gov/Archives/edgar/data/7032/000119312509253285/d10k.htm>

⁵¹ Reutter, David. "Prison Food..." (2018). No Page.

⁵² Johnson, Bob. "Food in Trash Served to State Prisoners in Saginaw County; Aramark Worker Fired." Mlive.com. March 31, 2015.
https://www.mlive.com/news/saginaw/2015/03/aramark_employee_served_sagina.html.

⁵³ Johnson, Bob. (2015). No Page.

⁵⁴ Feldscher, Kyle. "Aramark Worker Ordered Prisoner to Feed Inmates at Michigan Prison Cake Partially Eaten by Rodents." Mlive.com. March 17, 2015.
https://www.mlive.com/lansing-news/2015/03/inmates_at_mid-michigan_prison.html#incart_story_package.

⁵⁵ Feldscher, Kyle. (2015). No Page.

offset by prison officials.⁵⁶ After the riot, many participants and officials were interviewed regarding the conditions, and it was found that a “report indicated that almost every prison employee and prisoner who was interviewed cited complaints about food quality and canteen prices as contributing factors to the disturbance:” yet, on paper, the prison insinuated that the prisoners rioted because of the current lockdown policies.⁵⁷ Other prison strikes label Aramark the “biggest benefactors of prisoners...neglecting prisoners, serving bad food, not enough food, or undernourished food...”⁵⁸ Despite constant instances like the ones mentioned above, Aramark and other private contract service providers continue to rack up prison contracts while the prison industry saves money.

⁵⁶ Reutter, David. “Food Problems Contribute to Riot at Kentucky Prison: Prison Legal News.” Food Problems Contribute to Riot at Kentucky Prison | Prison Legal News., April 15, 2010. <https://www.prisonlegalnews.org/news/2010/apr/15/food-problems-contribute-to-riot-at-kentucky-prison/>.

⁵⁷ Reutter, David. (2010). “Food Problems...”

⁵⁸ Kelkar, Kamala. "Prison Strike Organizers to Protest Food Giant Aramark." PBS. January 08, 2017. <https://www.pbs.org/newshour/nation/prison-strike-protest-aramark>.

CHAPTER THREE

FOOD LAW IN PRISON

As was established earlier, most courts rule with a hands off approach when looking at incidences within a correctional institution as they have their own rein, only stepping in when blatantly obvious infractions are occurring.⁵⁹ This is the same approach when looking at food law, so standards outside of correctional institutions may greatly differ from what is taking place within due to varying oversight.⁶⁰ Thus the current state of law regarding prison food is an outcome of prison law and is very similar in process. For sanitation or nutrition conditions to be held unlawful, a petitioner must show the same components as Eighth Amendment violations;⁶¹ harm done, deliberate indifference and recklessness through a subjective and objective showing of proof. A prisoner cannot simply juxtapose

⁵⁹ *Bethea v. Crouse*, 417 F. 2d 504 (10th Cir. 1969). Retrieved from <https://casetext.com/case/bethea-v-crouse>

⁶⁰ Naim, Cyrus. "Prison Food Law." Leadership Enterprise for a Diverse America at Harvard. Food & Drug Law. (Spring, 2005). Retrieved from <https://dash.harvard.edu/bitstream/handle/1/8848245/Naim05.html?sequence=2&isAllowed=y> No Page, within Abstract.

⁶¹ Naim, Cyrus. "Prison Food Law." (2005). Paragraph 1 and 2 under "Prison Food Law Today."

the standards outside compared to the ones within a prison expecting a holding of unlawfulness.

Being that many prisons, even if they aren't privately owned, outsource food services, it is up to the management of the food service company to provide food handling and sanitation training. But, with contracts going to the lowest bidder, and contracts only allowing for the bare minimum, some providers are employing low-skill, low-wage workers (oftentimes prisoners), and not investing much into their training: "lack of training means mistakes are common. 'They don't label things, they don't rotate the stock the way it's supposed to be'...that means people get sick 'a lot'." ⁶²

With no overseer outside of the prison, some companies may feel like they can skirt around preferred standards, which leads to a disproportionate number of cases of foodborne illness in prisons, especially when profit margins are thin. ⁶³ In comparison to food industry workers in general population settings, prison food workers "lack...sufficient hand washing areas, lack sufficient training in sanitation and disease prevention..." ⁶⁴ which could be related to the implications of food handling in over half of foodborne illness reports that indicated a source. ⁶⁵ Although the US Food and Drug Administration has food safety guidelines that are required to be followed by federal correctional institutions, many other governmental branches, such as state and local facilities, draft their own guidelines which may not be as safe. ⁶⁶

⁶² Joe Fassler, Claire Brown. (2017). No Page.

⁶³ Marlow, et. al. Page 1150.

⁶⁴ Marlow, et. al. Page 1150.

⁶⁵ Marlow, et. al. Page 1152.

⁶⁶ Marlow, et. al. Page 1154.

Even when food safety regulations are being violated, with many courts not wanting to be involved, it becomes hard to regulate the system and correct it. Unless of course, a petitioner gains enough public attention and support from showing evidence of legitimate violations as defined by Eighth Amendment tests. Then, recourse seems to be fining a contracted provider or firing implicated employees; yet, these are only temporary solutions to a much bigger problem. The laissez faire approach for keeping governmental entities honest is not the best way to protect the rights of those in the government's care. It is almost ironic as politicians and investors give more and more money to the private prison industry in hopes of passing policy that ups the number of arrests and convictions; yet budgets for maintaining the health and wellness of prisoners are reducing. Not only that, but courts are less likely to protect prisoners from violations of their Eighth Amendment, because they do not want to deal with the bureaucracy of private companies who are literally funding the high incarceration rate and severely exploiting those incarcerated.

CHAPTER FOUR

PENOLOGY

The basis for punishment is found in four principles, deterrence, rehabilitation, retribution, and incapacitation:

Retribution refers to just deserts: people who break the law deserve to be punished. The other three goals are utilitarian, emphasizing methods to protect the public. They differ, however, in the mechanism expected to provide public safety. Deterrence emphasizes the onerousness of punishment; offenders are deterred from committing crimes because of a rational calculation that the cost of punishment is too great. The punishment is so repugnant that neither the punished offender (specific deterrence) nor others (general deterrence) commit crimes in the future. Incapacitation deprives people of the capacity to commit crimes because they are physically detained in prison. Rehabilitation attempts to modify offenders' behavior and thinking so they do not continue to commit crimes.⁶⁷

⁶⁷ Mackenzie, Doris Layton. "Sentencing and Corrections in the 21st Century: Setting the Stage for the Future." Evaluation Research Group. University of Maryland: Department of Criminology and Criminal Justice. iii. Retrieved from <https://www.ncjrs.gov/pdffiles1/nij/189106-2.pdf>

As eras of criminal justice phase in and out, different principles hold more weight than the others in what is called a punitive turn.⁶⁸ Reflected in the criminal justice system are the views of punishment that society feels most comfortable with. By the 1990's a deterrence and incapacitative approach to punishment was apparent in the crime control model.⁶⁹ This can be shown in the harsher sentences given for lesser crimes, increased incarceration rates, as well as the treatment of the incarcerated population.⁷⁰ As the views change to a more liberal approach fewer people are imprisoned, shorter sentences are given, and more rehabilitative programs are made available. Unfortunately in the present time, although the general views have turned towards more liberal goals of punishment, written policy has not followed the same trend.⁷¹ This could be corroborated with the fact that prison corporations have helped to fund policies that maintain high rates of incarceration and prison policy. This stance may not reflect society's, as a whole, view on imprisoning the masses.

Regrettably, allowing private prison corporations to have reign over penology keeps outside policy at bay. This leads to prison policy that reflects their own interests instead of the evolving beliefs of society. That fact, coupled with courts laissez faire

⁶⁸ Phelps, Michelle S. "The Place of Punishment: Variation in the Provision of Inmate Services Staff across the Punitive Turn." *Journal of Criminal Justice* 40, no. 5 (2012): 348.

⁶⁹ Mackenzie, Doris Layton. ii. Retrieved from <https://www.ncjrs.gov/pdffiles1/nij/189106-2.pdf>

⁷⁰ Mackenzie, Doris Layton. iii. Retrieved from <https://www.ncjrs.gov/pdffiles1/nij/189106-2.pdf>

⁷¹ Phelps, Michelle S. 349.

approach, creates a breeding ground for unconstitutional punishments to flourish under the actions from governmental contracts.⁷²

Punishment, on top of a prison sentence, comes in the form of isolative confinement, privileges, and food within prison—among other modes. Revoking food privileges as a response to a prisoner's actions pushes it into the realm of retributive punishment: "those strategies have all the features of normal accounts of punishment: they are censorious, they impose deprivation, they are carried out by those in authority in response to a transgression, and so forth."⁷³ Exploiting a basic need as a form of punishment is that of a torture tactic and serves no other need but to harm. Cesare Beccaria had enough reason to be against such punishment even in the 1760's. So its occurrence in modern day corrections is of utmost disbelief. Inherently retributive, this form of punishment does not reflect the ideals of an evolved society, even with regards to proportionality to crime. In a world where not feeding your dog will get you criminal charges, why can prison corporations get away with withholding food and serving nowhere near quality or quantity as set by standard? There is no societally acceptable explanation for the use of starvation as punishment. Such deprivations have a layer of intentionality despite failures on the part of the prisoners to prove such.

⁷² Ethridge, Philip A, and James W Marquart. "Private Prisons in Texas: The New Penology for Profit." *Justice Quarterly* 10, no. 1 (1993): 32.

⁷³ Nathan, Christopher. "PRINCIPLES OF POLICING AND PRINCIPLES OF PUNISHMENT." *Legal Theory* 22, no. 3-4 (12, 2016): 197.

CHAPTER FIVE

EIGHTH AMENDMENT PROVISIONS

Most often thought of in terms of bail reform and capital punishment, the Eighth Amendment provides certain protections for individuals interacting with institutions within the government: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”⁷⁴ Some view this amendment as a way to attack or invalidate government actions that have the risk of constitutional violations.⁷⁵ This stance means that individuals think it gives the imprisoned population an upper-hand to

⁷⁴ U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

⁷⁵ Stinneford, John F. "THE ILLUSORY EIGHTH AMENDMENT." *American University Law Review* 63, no. 2 (2013): 437-495. Page 437. <https://search-proquest-com.ezproxy.usd.edu/docview/1500751245?accountid=14750>.

complain and get back at the justice system. In reality, rules implemented through various cases regarding the amendment toss aside more claims than they validate.⁷⁶ This is a result of constitutional decision rules where, “the function of such a rule is to minimize the sum of error costs resulting from ‘false negatives’ (judicial failures to recognize a constitutional violation where one has occurred) and ‘false positives’ (judicial findings of a constitutional violation where none has occurred).”⁷⁷

Rules that attempt to further interpret the Eighth Amendment are aplenty in Eighth Amendment violation hearings. For example, court adaptations require specific assertions from the petitioner. A petitioner must show deliberate indifference on the part of the defendant,⁷⁸ show recklessness through a subjective recklessness test,⁷⁹ state a claim of specific incidences (not a totality of the circumstances),⁸⁰ and must show seriously significant harm done or endured.⁸¹ These aspects are all requisite and must be proven in order for a claim to be considered a valid violation. These requisites prove to be barriers in many cases and, oftentimes, a petitioner fails to prove an aspect. Although other elemental pieces may be valid, a court can dismiss a claim when requisites have not been met.

Regularly brought up in Eighth Amendment cases is the complaint of cruel and unusual punishment. Case law has defined what factors merge to form *cruel* punishment

⁷⁶ Stinneford, John F. "THE ILLUSORY EIGHTH AMENDMENT." *American University Law Review* 63, no. 2 (2013): 437-495. Page 437. <https://search-proquest-com.ezproxy.usd.edu/docview/1500751245?accountid=14750>.

⁷⁷ Stinneford, John. p. 449

⁷⁸ *Estelle v. Gamble*, 429 U.S. 97 (1976).

⁷⁹ *Farmer v. Brennan*, 511 U.S. 825 (1994).

⁸⁰ *Tuckor v. Rose*, 955 F. Supp. 810 (N.D. Ohio 1997).

⁸¹ *Farmer v. Brennan*, 511 U.S. 825 (1994).

over the years, but has appeared to shy away from developing the framework for the term *unusual*.⁸² This grey area could be explained potentially by no true separation between *cruel* and *unusual* when it comes to discussing violations of the rights of prisoners. There is also the less-plausible notion that courts have yet to view a punishment as unusual. In *Trop v. Dulles* (1958), it was questioned if the term “unusual” had meaning independent from that of “cruel.”⁸³ Ultimately, the court came to the conclusion that that the distinction was unimportant, irrespective of the question of inhumane treatment; however, it may insinuate a punishment was different from the status quo.⁸⁴

Looking at the verbiage in case law regarding Eighth Amendment violations, it seems that punishments which are shown to be lacking “contribution to acceptable goals of punishment”⁸⁵, “grossly disproportionate” to the crime committed,⁸⁶ “involve the unnecessary and wanton infliction of pain”,⁸⁷ are “totally without penological justification”,⁸⁸ and do not reflect “evolving standards of decency,”⁸⁹ are Eighth Amendment determinations in regards to the term *cruel*. A rendition of the term *unusual*

⁸² Stinneford, John. p. 442

⁸³ *Trop v. Dulles*, 356 U.S. 86 (1958).

⁸⁴ *Trop v. Dulles*, 356 U.S. 86 (1958).

⁸⁵ *Coker v. Georgia*, 433 U.S. 584 (1977). Retrieved from <https://supreme.justia.com/cases/federal/us/433/584/>

⁸⁶ *Coker v. Georgia*, (1977). 433 U.S. 584 (1977).

⁸⁷ *Gregg v. Georgia*, 428 U.S. 153 (1976). Retrieved from <https://supreme.justia.com/cases/federal/us/428/153/>

⁸⁸ *Gregg v. Georgia*, (1976). Note: the death penalty is not disproportionate to the crime of murder and does not offend human dignity since some crimes are so severe it is the only appropriate response. Social consensus is in favor of retaining the death penalty.

⁸⁹ *Trop v. Dulles*, 356 U.S. 86 (1958). Retrieved from <https://www.law.cornell.edu/supremecourt/text/356/86>

can be found in Justice Marshall's opinion in *Furman v. Georgia*, (1972).⁹⁰ Here, the opinion states that, "there are punishments that are unusual, signifying that they were previously unknown as penalties for a given offense..."⁹¹ Respective to that idea, is it common in modern times to starve someone or feed them slop as punishment for their offense, or does a judge and jury sentence them to prison as punishment? It would be illogical to categorize food as punishment being anything other than unusual. Most cases in which food was used as punishment, there is rarely a violation found due to qualified immunity, deliberate indifference, or even intent clauses on behalf of defendants. These are all guidelines for making findings on claims, all which have emerged from court interpretations of the Eighth Amendment.

Intent behind punishment is paramount in determining violations of the Eighth Amendment, as traditional penology focuses on intent of the government actor.⁹² Although intent may not be inherently obvious, there is the common occurrence of an action that could be quasi-punishment:

the existence of a practice that is (1) relevantly similar to punishment, but that (2) we are hesitant to label as "punishment," while nonetheless is (3) on reflection ultimately justified. Furthermore, it is a practice that (4) we are hesitant to label as "punishment" because, prior to reflection, we sense it is unjustified (and not merely because we sense it is not punishment).⁹³

⁹⁰ *Furman v. Georgia*, 408 U.S. 238 (1972). Retrieved from, <https://supreme.justia.com/cases/federal/us/408/238/>

⁹¹ *Furman v. Georgia*, 408 U.S. 238 (1972). Retrieved from, <https://supreme.justia.com/cases/federal/us/408/238/> Note: the death penalty violated the 8th Amendment prohibition on cruel and unusual punishment as well as 14th Amendment prohibitions against discrimination as it was applied in a random and inconsistent manner

⁹² Nathan, Christopher. "PRINCIPLES OF POLICING AND PRINCIPLES OF PUNISHMENT." *Legal Theory* 22, no. 3-4 (12, 2016): 186.

⁹³ Nathan, Christopher. "PRINCIPLES OF POLICING AND PRINCIPLES OF PUNISHMENT." *Legal Theory* 22, no. 3-4 (12, 2016): 187.

In respect to the occurrence of an action that closely reflects punishment, the resulting outcome on the prisoner would be similar to that of a “true” punishment. Depriving an individual of food will still make them starve, regardless of the intent of it being a punishment. The hesitancy to label something as a punishment, in fear of setting precedence, does not dissolve the meaning behind the action, or harm endured. This is not to say anything and everything should be labeled punishment when it feels like it is punishment. Instead, it takes a look at how some prisons may get by with fewer violations because they refuse to label something as punishment.

As the prohibitions outlined in the Eighth Amendment have been interpreted in broader respects, food still continues to be an unbridled source of discipline and punishment. Compliance and control are principle in exploiting food: “By controlling food intake and dietary habits... institutions are able to use food as a disciplinary mechanism that aids in the management, governance, and regulation of prisoners... this process encourages and even coerces incarcerated populations to be docile and compliant.”^{94,95}

⁹⁴ De Graaf, K., & Kilty, J. M. (2016). You are what you eat: Exploring the relationship between women, food, and incarceration. *Punishment & Society*, 18(1), 27-46. p. 31.

⁹⁵ Note: World War I and World War II Prisoner of War camps used food as a wartime strategy. Giving prisoners just enough food to be able to carry out labor while withholding the rest of the ration was prevalent. It was found that after the war there were food stockpiles, meant for POW's. This tactic kept individuals complacent, with no energy to escape, only enough to stay alive another day. In the same time frame, starvation was being used for large populations in concentration camps, such as Auschwitz. What took place at Auschwitz is another example of how food, or lack thereof, can be used as a torture tactic. Labeling what occurred in Auschwitz as punishment would be a poor choice, as the events that took place did not fit the standard goals of punishment. There was no basis for deterrence, retribution, rehabilitation, or

Emerging from a hands-off approach, when looking at how prisons govern themselves, judges leave room for violations to occur. Discretion of the court to apply evolving standards of decency determinations and varying court rules, essentially allows for Eighth Amendment cases surrounding food to be dismissed prematurely with and without precedence. Cut and dry decision making in courts does happen, but in Eighth Amendment claims there are more hoops to jump through on behalf of the petitioner. This leaves many areas for which a claim can fail, even if a cruel and unusual punishment did occur. There must be a way to mitigate this risk, in order to lessen the number of cases where the courts fail an incarcerated person.

incapacitation. These events went even further than the traditional goals, torturing the innocent. This is a blatant violation of what the Eighth Amendment would deem cruel and unusual. The presence of stockpiles of food meant for those in the camps shows there was a method to the starvation. These camps were not starving individuals because they had no resources, they were starving them with purpose.

See for information:

Jones, Heather. "The Final Logic of Sacrifice? Violence in German Prisoner of War Labor Companies in 1918." *Historian* 68, no. 4 (2006): 770-91.

Durbach, Nadja. *Many Mouths: The Politics of Food in Britain from the Workhouse to the Welfare State*. Cambridge, United Kingdom: Cambridge University Press, 2020. 114-146, 178-211.

Perhaps this shows a parallel in the profits made off of privatization contracts. Prison contracts allot a set amount of the budget to each prisoner; yet, contractors are making millions of dollars off these agreements. This is occurring while the quality and quantity of food made available to prisoners constantly decreases. The contract providers have the capability to provide a much better option to the prisoners. They instead choose to profit off of them, keeping them compliant and controlled with the looming issue of food. There surely has to be intent behind choosing to profit instead of providing food and services that are closer to a minimum standard of treatment. Underlying levels of intent behind this choice, in and of itself, should be sufficient enough to prove intent of punishment in Note cont': Eighth Amendment claims. In showing intent, more of the cases depicting Eighth Amendment claims would be validated. This in turn, would turn the tides and draw notice to the unusual tactic of food as punishment. Courts would ideally adapt a new approach to these cases, on course with evolving standards of decency.

There are massive gray areas in Eighth Amendment violation claims, varying on a case by case basis, which is difficult for courts to wade through. But then again, there are still large amounts of uncertainty in the current judicial system for weeding out those claims. At what point does society weigh in on whether or not courts or the incarcerated population has an advantage in the judicial system? If the end result of two cases was the same, individuals being withheld food for the same reason, why should one be dismissed on the basis that intent was unable to be found? People on the other side of the topic will argue that courts would be bogged down when considering claims on a case by case basis. This is already the case; courts are ruling with discretion to dismiss cases based on whether or not requisites are met. Shifting the focus of requisite proof to the end result of harm instead of the focus of intent would not burden courts any more than they are currently. Conceivably, this would allow some of the requisite elements, such as intent, need not be present in a claim for it to be valid. It does not matter whether the title of punishment or intent on a certain act was present; however, it would be reasonable to look into whether the action was justified from the start.

CHAPTER SIX

MINIMUM STANDARDS OF TREATMENT

In 1948, the Universal Declaration of Human Rights encompassed the belief in which, “everyone has the right to a standard of living adequate for the health of himself and his family, including food, clothing, housing and medical care, and necessary social services.”⁹⁶ Being that “everyone” has the right to an adequate standard of living, including the aspect of food, it would logically follow that prisoners should be served adequate nutrition. Unfortunately, as it stands, prisoners are withheld meals, served Nutraloaf (which has been shown to have a negative impact on prisoners’ health ranging from constipation to high sodium levels), and are forced to supplement the daily standard of nutrition with commissary items, while they are in the care and custody of the carceral system.

⁹⁶ Pillay N: Right to Health and the Universal Declaration of Human Rights. *Lancet* 372: 2005–2006, 2008. Available online at DOI: 10.1016/S0140-6736(80)61783-3

During the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1955, a standard minimum requirement relating to treatment of prisoners was drafted. In this document were the fundamentals which a carceral system could adopt and tailor on the basis of eliminating complaints stemming from alleged cruel and unusual punishment regarding to food: “Every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served.”⁹⁷ Examples shown in cases where 700 calories per day in bread and water was a diet,⁹⁸ or where a 1,000 calories per day Nutraloaf diet was implemented,⁹⁹ clearly do not meet the standard guideline of 2,000 calories a day.¹⁰⁰ That being said, they do not meet the age old guideline set in 1955. Since there is an evolving sense of decency, it should follow that courts would rule in favor of complainants in cases similar to deprivation of food or restricted diets. Unfortunately, as detailed in the previous chapter, most courts impose added requirements and rules that essentially bar any claim from being a valid violation of the Eighth Amendment, due to deliberate indifference precedence.

The American Bar Association’s 2010 publication, *ABA Treatment of Prisoners Standards*, outlines the standards for healthful food:

⁹⁷ UN Economic and Social Council (ECOSOC), *Standard Minimum Rules for the Treatment of Prisoners*, 13 May 1977, available at: <http://www.refworld.org/docid/514daf202.html>

⁹⁸ Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971).

⁹⁹ See previously mentioned: Phelps v. Kaplonas, US v. Michigan, Myers v. Milbert, Adams v. Kinechelow, Smith v. Oregon Department of Corrections.

¹⁰⁰ Institute of Medicine. Dietary Reference Intakes for Energy, Carbohydrate, Fiber, Fat, Fatty Acids, Cholesterol, Protein, and Amino Acids. Washington (DC): The National Academies Press; 2002

- (a) Correctional authorities should provide each prisoner an adequate amount of nutritious, healthful, and palatable food, including at least one hot meal daily. Food should be prepared, maintained, and served at the appropriate temperatures and under sanitary conditions. (b) Correctional authorities should make appropriate accommodations for prisoners with special dietary needs for reasons of health or age. (c) Correctional authorities should not withhold food or water from any prisoner. The standard menu should not be varied for any prisoner without the prisoner's consent, except that alternative food should be permitted for a limited period for a prisoner in segregated housing who has used food or food service equipment in a manner that is hazardous to the prisoner or others, provided that the food supplied is healthful, palatable, and meets basic nutritional requirements.¹⁰¹

Although these standards have been set for many decades, it is clear that there may be discrepancies within prisons about implementing them, as a devolving food environment is present in prison with smaller portions and lower quality food:

Incarcerated participants often romanticized the “good old days” of prison chow. For instance, during their smoke break one day, I listened as two veteran prisoners discussed recent meals at SSP. The first, a middle-aged man who had been “in and out of prison a few times,” walked beside the second, who had spent decades of his life in prisons across multiple states. Taking deep drags from their cigarettes, they lamented changes in the carceral system over the years, especially as regarded the food. They alleged that minimum food portion requirements are today rarely met and chow line workers are instructed to dish out smaller helpings. “The only time the trays [portion sizes] are right are when the wardens visit,” the first man grumbled. “After they leave, it’s back to normal.”¹⁰²

In fact, think of any past prisoner who has told of their experience with food while incarcerated... it has become almost an inside joke or even a stereotypical analysis of

¹⁰¹ Standard 23-3.4: Healthful Food. ABA Standards for Criminal Justice: Treatment of Prisoners. Third Edition. Pages. 81-84. (2010) Retrieved from https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/Treatment_of_Prisoners.pdf

¹⁰² Gibson-Light, Michael. Page 207.

prison food, that it is severely lacking. Food in prison has become a mainstream symbol for the overall experience by those incarcerated, and it is not a pleasant one.¹⁰³

Nutrition that is provided is so poor that many of those incarcerated take part in punishable lucrative dealings such as, “secure extra portions, hoard food, smuggle and steal food, and cook and eat in cells.”¹⁰⁴ Those working in kitchen roles often steal food to provide themselves, as well as their peers, supplemental sustenance.^{105, 106} Supplementing the food provided by the prison is a necessity, considering that food service providers such as Aramark consider water to part of a portion:

“On one occasion when I was assigned as a kitchen worker, an Aramark employee berated me for draining water off the vegetables after they were cooked. ‘Water is part of the serving,’ the employee said. That would result in prisoners who were unfortunate enough to be served from the bottom of the pan receiving just a few green beans in a scoop of water.”¹⁰⁷

Incentive to serve small amounts of poor quality food is apparent, as it stimulates those incarcerated to spend money on commissary items that have inflated prices at the benefit of the contract holder.¹⁰⁸ Low wages in the prison coupled with high prices of commissary food tends to replicate a dilemma seen in other impoverished groups such as price gouging in poverty stricken food-deserts. Discriminatory pricing is another harsh reality that

¹⁰³ Smith, Catrin. "Punishment and Pleasure: Women, Food and the Imprisoned Body 1." *Sociological Review* 50, no. 2 (2002): 197-214. Page 203.

¹⁰⁴ Smoyer, Amy B. "Making Fatty Girl Cakes." *The Prison Journal* 96, no. 2 (2016): 191–209. <https://doi.org/10.1177/0032885515596520>. Page 194.

¹⁰⁵ Smoyer, Amy. Page 196.

¹⁰⁶ De Graaf, K., & Kilty, J. M. (2016).

¹⁰⁷ Reutter, David. "Prison Food and Commissary Services: A Recipe for Disaster: Prison Legal News." *Prison Food and Commissary Services: A Recipe for Disaster* | Prison Legal News, August 2018. <https://www.prisonlegalnews.org/news/2018/aug/4/prison-food-and-commissary-services-recipe-disaster/>.

¹⁰⁸ Reutter, David. "Prison Food..." (2018).

prisoners face as prison companies attempt to make a profit off of them while discarding their basic right to adequate nutrition. Despite humane standards of treatment being a requirement, private prisoners are able to skirt past them due to the lack of oversight in management and standards of servings being met on technicalities.

CHAPTER SEVEN
APPLICATION OF THE EIGHTH AMENDMENT
SECTION A:
COURT CASES

Over the last one-hundred years, judges have made attempts to define what the prohibitions of the Eighth Amendment mean relating to a variety of circumstances in elusive case facts. As time progressed, the prohibitions gained broader ground, respective to what was considered cruel and unusual punishment at the time of the determination of the case in question: “The Eighth Amendment is progressive, and does not prohibit merely the cruel and unusual punishments known in 1689 and 1787, but may acquire wider meaning as public opinion becomes enlightened by humane justice...”¹⁰⁹ Corresponding with that notion, using food as an apparatus of punishment, at the cost of prisoners’ health and well-being, could be interpreted as cruel and unusual in the present world. Although

¹⁰⁹ Weems v. Georgia, 217 U.S. 349 (1910). Retrieved from <https://supreme.justia.com/cases/federal/us/217/349/>

precedent may not have been considered so in the past. Revoking food privileges or depriving food in reaction to something a prisoner did, is a form of punishment in a very fundamental realm. Invoking this punishment for reasons that are invalid or disproportionate makes it a constitutional violation. As the system currently leans, determining the validity of food as punishment is not that simple. A sampling of cases in chronological order helps to build a better understanding of the bigger picture and the tendency to find more situations falling under the prohibited provisions over time, rather than just the strict notion of torture and death penalty being cruel and unusual.

In *Weems v. U.S.*, (1910), the court acknowledges that the Eighth Amendment is a forward-evolving mechanism and may encompass more punishments as cruel and unusual in the future.¹¹⁰ For this case in specific, the court held that a consideration of punishment must reflect the punishment of identical or similar crimes in the United States; therefore, a punishment must be proportional to the crime committed, as determined in prior cases.¹¹¹ There is a link here that could be interpreted as, “food has not been deemed a punishment by the courts for any offense, therefore it is not proportional to the crime from looking at national punishments of the same crime.” In looking at proportionality, *Trop v. Dulles*, (1958) decided it is unconstitutional to revoke citizenship as a punishment for a crime, reflecting the newly minted opinion that “the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”¹¹² This case

¹¹⁰ *Weems v. Georgia*, 217 U.S. 349, 368 (1910). (“punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life.”)

¹¹¹ *Weems v. Georgia*, 217 U.S. 349 (1910).

¹¹² *Trop v. Dulles*, 356 U.S. 86 (1958).

has been fundamental in further interpretations of the Eighth Amendment so that prisoners' rights are not withheld by arcane analyses of the Amendment.

Within *Bethea v. Crouse*, (1969), it is noted that courts are generally consistent with a "hands off" policy with regards to prison administration and its management of "discipline, treatment, and care of those confined," although there are times when a true complaint shows "abuse or caprice" on behalf of the prison's officials that needs to be looked at.¹¹³ More importantly the question drawn from the court, as cited in *Dearman v. Woodson*, (1970), is: "Were the acts mere discipline in pursuit of quelling a prison disturbance or were they something more which amounted to a clear abuse or caprice, resulting in an infringement of constitutional rights?"^{114 115} An inference that could be drawn from this is that perhaps during a riot, or in response to poor behavior, prisoners could be punished with food privileges or restrictions, but not in general. Using *Bethea*, *Dearman v. Woodson*, (1970), held that although deprivation of food for 50.5 hours was sufficient to state a claim of an Eight Amendment violation, there were extenuating circumstances that allowed for the actions of the prison officials.¹¹⁶ Had there not been a riot at the prison that preceded these events, the claim would have been valid; yet, the action was dismissed due to riot conditions underlying the situation.¹¹⁷ Whereas in *Landman v. Royster*, (1971), prisoners who faced severe corporal punishment and the imposition of a bread and water diet of 700 calories daily, were found to have Eighth Amendment

¹¹³ *Bethea v. Crouse*, 417 F. 2d 504 (10th Cir. 1969), <https://casetext.com/case/bethea-v-crouse>

¹¹⁴ *Bethea v Crouse*, 417 F. 2d 504 (10th Cir. 1969)

¹¹⁵ *Dearman v. Woodson*, 429 F.2d 1288, 1290 (10th Cir. 1970). Retrieved from <https://law.justia.com/cases/federal/appellate-courts/F2/429/1288/433649/>

¹¹⁶ *Dearman v. Woodson*, 429 F.2d 1288, 1290 (10th Cir. 1970)

¹¹⁷ *Dearman v. Woodson*, 429 F.2d 1288, 1290 (10th Cir. 1970)

violations, winning a class action suit and were awarded damages.¹¹⁸ This finding may have been due to the combination of corporal punishment and caloric intake, although the caloric intake in itself is enough to violate minimum standards of nutrition as outlined in the previous chapter. As briefly mentioned earlier, *Furman v. Georgia*, (1972) found the death penalty violated the 8th Amendment prohibition on cruel and unusual punishment, namely unusual; as well as, 14th Amendment prohibitions against discrimination as it was applied in a random and inconsistent manner.¹¹⁹

Following precedent set by *Landman, Estelle v. Gamble*, (1976), acknowledged that the provisions of the Eighth Amendment could be applied to deprivations that were not part of the sentence; yet, still suffered in prison in various forms of health conditions.¹²⁰ The specifics of the case were that deliberate indifference on the part of prison personnel to serious illness or injury was enough for a valid claim of a violation.¹²¹ The case of *Hutto v. Finney*, (1976), had food aspects that were taken into account when finding isolation conditions unconstitutional. In isolation, prisoners received less than 1,000 calories per day, in a substance called *grue*—“a substance created by mashing meat, potatoes, oleo, syrup, vegetables, eggs, and seasoning into a paste and baking the mixture in a pan.”¹²² The court found that serving a substance like ‘grue’ for an extended period of time may be

¹¹⁸ *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971). Retrieved from <https://law.justia.com/cases/federal/district-courts/FSupp/333/621/1606763/>

¹¹⁹ *Furman v. Georgia*, 408 U.S. 238 (1972).

¹²⁰ *Estelle v. Gamble*, 429 U.S. 97 (1976). Retrieved from <https://supreme.justia.com/cases/federal/us/429/97/>

¹²¹ *Estelle v. Gamble*, 429 U.S. 97 (1976).

¹²² *Hutto v. Finney*, 410 F. Supp. 251, 276 n.12 (E.D. Ark. 1976). Retrieved from <https://supreme.justia.com/cases/federal/us/437/678/>

intolerably cruel or unusual and, as a result, put limits on confinement in isolation as well as a general rule of thumb for serving unpalatable substances.¹²³

With regards to withholding food and disproportionality, *Moss v. Ward*, (1978), found that withholding food for a period of 4 consecutive days is a disproportionate punishment for an inmate refusing to return a plastic cup and “went beyond what was necessary to achieve the state’s goals:”¹²⁴ “although being deprived of one or two meals might not be cruel and unusual punishment, prison officials cannot impose such severe sanctions for breaking a disciplinary rule, as occurred in the instant case, on prisoners when there is no showing that the prisoner is engaging in the type of conduct the rule is designed to prevent.”¹²⁵ There is a very large gray area in regards to what is deemed to be crossing the line of constitutionality, which is a result of the court’s discretion to rule.

The subjective nature of defendant’s mindset was pushed to the side and instead an objective analysis of prison conditions occurred in *Rhodes v. Chapman*, (1981).¹²⁶ The way of determining validity of the Eighth Amendment violation claim in this case was much different than what occurred in *Estelle*, as it did not look into the state of mind behind action.¹²⁷ Although this case broke precedence, it laid out how restrictive and harsh conditions are just the price prisoners have to pay for their offense.¹²⁸ Years later in *Whitley*

¹²³ *Hutto v. Finney*, 410 F. Supp. 251, 276 n.12 (E.D. Ark. 1976)

¹²⁴ *Moss v. Ward*, 450 F. Supp. 591, 596 (W.D.N.Y. 1978). Retrieved from <https://law.justia.com/cases/federal/district-courts/FSupp/450/591/1820046/>

¹²⁵ *Moss v. Ward*, 450 F. Supp. 591, 596 (W.D.N.Y. 1978)

¹²⁶ *Rhodes v. Chapman*, 452 U.S. 337 (1981). Retrieved from <https://supreme.justia.com/cases/federal/us/452/337/>

¹²⁷ *Rhodes v. Chapman*, 452 U.S. 337 (1981)

¹²⁸ *Rhodes v. Chapman*, 452 U.S. 337 (1981)

v. Albers, (1986), the subjective element was back in focus with a new display of proof that an action happened “maliciously and sadistically for the very purpose of causing harm.”¹²⁹

US v. Michigan, (1988), asserted that Nutraloaf was indeed a punishment, despite the prison officials’ claims that it was a preventative measure for behavior, but in this case its use was not cruel or unusual.¹³⁰ In special circumstances (suffering from a medical condition or it being grossly disproportionate to the offense) using Nutraloaf may constitute cruel and unusual punishment.¹³¹ *US v. Michigan*, (1988), cited many preceding prison food cases for its decision, as follows:

Cunningham v. Jones, 567 F.2d 643, 656, 660 (6th Cir. 1977) (“deliberate and unnecessary withholding of food essential to normal health can violate the Eighth Amendment”) See also *Hamm v. DeKalb County*, 774 F.2d 1567, 1575 (11th Cir.1985) (“The Constitution requires that prisoners be provided ‘reasonably adequate food’.... The fact that the food occasionally contains foreign objects or sometimes is served cold, while unpleasant does not amount to a constitutional deprivation.”); *Ramos v. Lamm*, 639 F.2d 559, 571 (10th Cir.1980), *cert. denied*, 450 U.S. 1041, 101 S. Ct. 1759, 68 L. Ed. 2d 239 (1981); *Robles v. Coughlin*, 725 F.2d 12, 15 (2d Cir.1983); *Jones v. Diamond*, 636 F.2d 1364, 1378 (5th Cir. 1981); *Smith v. Sullivan*, 553 F.2d 373, 380 (5th Cir.1977) (“A well-balanced meal, containing sufficient nutritional value to preserve health, is all that is required.”).¹³²

Meanwhile, in *Hodge v. Ruperto*, (1990), facts showed the deprivation of food and water for 2.5 days in an overcrowded and unsanitary cell is sufficient to draw reasonable inference of deliberate indifference, and petitioners may proceed with a valid Eighth Amendment claim.¹³³ On the heels of *US v. Michigan* (1988), *Adams v. Kincheloe*, (1990),

¹²⁹ *Whitley v. Albers*, 475 U.S. 312 (1986). Retrieved from <https://supreme.justia.com/cases/federal/us/475/312/>

¹³⁰ *US v Michigan*, 680 F. Supp. 270, 274-76 (W.D. Mich. 1988). Retrieved from <https://law.justia.com/cases/federal/district-courts/FSupp/680/270/1526782/>

¹³¹ *US v. Michigan*, 680 F. Supp. 270, 274-76 (W.D. Mich. 1988).

¹³² *US v. Michigan*, 680 F. Supp. 270, 274-76 (W.D. Mich. 1988).

¹³³ *Hodge v. Ruperto*, 739 F. Supp. 873, (S.D.N.Y. 1990). Retrieved from <https://law.justia.com/cases/federal/district-courts/FSupp/739/873/1610717/>

continued the legacy of *Nutraloaf*. *Adams* found that the serving of *Nutraloaf*, in this case, was not a violation of Eighth Amendment, but the manner in which it was served, officials dropping it on the cell floor for delivery, could be a triable issue.¹³⁴ Once again, *Nutraloaf* was found not to be a violation of the Eighth Amendment in *Smith v. Oregon Department of Corrections*, (1990), as it was a safety measure commonly used in the prison to, “reduce the use of food, eating utensils and human waste as weapons against staff and others.”¹³⁵

Another barrier for inmates to cross in order to have a valid Eighth Amendment claim popped up in *Wilson v. Seiter*, (1991). This case added a necessary level of intent—Eighth Amendment violation claims must also show a culpable state of mind on part of the prison official; thus, the deliberate indifference standard must apply to the analysis of the claim being sufficient to constitute cruel and unusual punishment.¹³⁶ So not only must a prisoner show that a prison official had deliberate indifference while depriving him/her to a level that amounts to a violation; but, they also need to show that the official did it with intent. Following *Wilson v. Seiter*, (1991), is *Gardner v. Beale*, (1991), where it was claimed that depriving a prisoner of one meal on the weekends was a violation of his Eighth Amendment rights. The court found there was no constitutionally protected interest created when a meal service manual stated prisoners would receive 3 meals a day; therefore, it was

¹³⁴ *Adams v. Kincheloe*, 743 F. Supp. 1385, 1390-92 (E.D. Wash. 1990). Retrieved from <https://law.justia.com/cases/federal/district-courts/FSupp/743/1393/2593854/>

¹³⁵ *Smith v. Oregon Department of corrections*, 792, P.2d 109, 542 (Or. App. 1990). Retrieved from <https://casetext.com/case/smith-v-dept-of-corrections-10>

¹³⁶ *Wilson v. Seiter*, 501 U.S. 294 (1991). Retrieved from <https://supreme.justia.com/cases/federal/us/501/294/>

not cruel and unusual punishment to serve 2 meals separated by a 18-hour interval on the days the work crew was not working.¹³⁷

The complaint of deprivation of food in *Cooper v. Sheriff, Lubbock County, Texas*, (1991), was originally dismissed on the grounds of qualified immunity and failure on the part of Cooper to state harm done; yet, on appeal, the court found the magistrate courts qualified immunity analysis fell flat as it was shown that the defendants acted outside the scope of authority and that Cooper had indeed stated harm incurred—a 13-day deprivation of food, 12 being consecutive days, made Cooper lose substantial weight.¹³⁸ The state of food served was the basis for complaint in *Islam v. Jackson*, (1992).¹³⁹ It was found that a failure to meet a prisoner's basic nutrition needs or unsanitary food service may constitute cruel and unusual punishment; yet, serving one maggot infested meal is not a violation, as missing a single meal is not critical to health.¹⁴⁰

Another case looking at deliberate indifference is *Farmer v. Brennan*, (1994). The opinion held that deliberate indifference towards an inmate's health or safety (including adequate food, clothing, shelter, medical care, and violence) is a violation under the 8th amendment, if the official knew the inmate faced substantial risk of serious harm (sufficiently serious) and disregards that risk by failing to take reasonable measure to stop that risk.¹⁴¹ This case also detailed the test for deliberate indifference, noting that a finding

¹³⁷ Gardner v. Beale, 780 F. Supp. 1073 (E.D. Va. 1991). Retrieved from <https://law.justia.com/cases/federal/district-courts/FSupp/780/1073/1444986/>

¹³⁸ Cooper v. Sheriff, Lubbock County, Texas, 929 F.2d 1078, 1082-83 (5th Cir. 1991). Retrieved from <https://casetext.com/case/cooper-v-sheriff-lubbock-county-tex>

¹³⁹ Islam v. Jackson, 782 F. Supp. 1111 (E.D. Va., 1992). Retrieved from <https://law.justia.com/cases/federal/district-courts/FSupp/782/1111/2185693/>

¹⁴⁰ Islam v. Jackson

¹⁴¹ Farmer v. Brennan, 511 U.S. 825 (1994). Retrieved from <https://supreme.justia.com/cases/federal/us/511/825/>

of subjective recklessness would cover the elements needed to prove deliberate indifference.¹⁴² *Williams v. Coughlin*, (1995) turned to the subjective recklessness test when Williams was deprived food and lost consciousness because he failed to return a used Styrofoam tray to an officer.¹⁴³ The two-day deprivation of food could be a cruel and unusual punishment, in other circumstances, but there was little fact to determine deliberate indifference of the prison officials in the acts of deprivation in accordance with the subjective recklessness test.¹⁴⁴ In the discussion of *Tuckor v. Rose*, (1997) it was established that a claim has to be centered on a specific condition that violates an inmate's rights and not the totality of the circumstances.¹⁴⁵ The suggested presence of rodents in the food was not enough to build liability for a violation of Eighth Amendment rights even if it was true, because it was an isolated incident and not a sufficiently serious deprivation.¹⁴⁶

For the decision in *Breazil v. Bartlett*, (1997), the court held that the Eighth Amendment does not prohibit restricting diet as a punitive measure, so long as the restricted diet is nutritionally adequate and there is no imminent threat to health.¹⁴⁷ Deprivation of food in *Talib v. Gilley*, (1998) was found to be not cruel and unusual punishment as the withholding of 50 meals over 5 months was on his own accord of not maintaining safety

¹⁴² *Farmer v. Brennan*, 511 U.S. 825 (1994).

¹⁴³ *Williams v. Coughlin*, 875 F. Supp. 1004, (W.D.N.Y. 1995). Retrieved from <https://law.justia.com/cases/federal/district-courts/FSupp/875/1004/1395181/>

¹⁴⁴ *Williams v. Coughlin*, 875 F. Supp. 1004, (W.D.N.Y. 1995).

¹⁴⁵ *Tuckor*, 955 F. Supp. 810 (N.D. Ohio 1997). Retrieved from <https://law.justia.com/cases/federal/district-courts/FSupp/955/810/1515924/>

¹⁴⁶ *Tuckor v. Rose*, 955 F. Supp. 810 (N.D. Ohio 1997).

¹⁴⁷ *Breazil v. Bartlett*, 998 F. Supp. 236, 242 (W.D.N.Y. 1997). Retrieved from <https://law.justia.com/cases/federal/district-courts/FSupp/998/236/1657705/>

positions mandated at the prison.¹⁴⁸ Whereas in *Simmons v. Cook*, (1998), putting paraplegics in maximum security cells without their medical supplies, special mattresses, and inadequate room to get to the door—resulting in the missing of four consecutive meals and medical complications—was a violation of their Eighth Amendment rights.¹⁴⁹ Since they showed the objective component and subjective elements necessary in Eighth Amendment claims, they were awarded damages of \$2,000 per person.¹⁵⁰ In *Berry v. Brady*, (1999), an Eighth and Fourteenth Amendment violation claim surfaced when Berry stated he was denied 8 meals over a 7-month period and denied visitation privileges for refusing to shave. The court found his claim was “frivolous and failing to state a claim” and was not cruel and unusual punishment as petitioner failed to show he had received an inadequate diet that threatened his health and that visitation privileges were at the discretion of prison officials.¹⁵¹

The case of *Phelps v. Kapnolas*, (2002), saw another claim from the implementation of a restricted diet consisting of a substance akin to Nutraloaf and raw cabbage.¹⁵² This specific case saw a 30-pound weight loss, abdominal pain, and emotional distress; yet, was dismissed as Phelps failed to show that the prison officials had deliberate indifference when subjecting him to this restricted diet.¹⁵³ Another Nutraloaf claimant in *Myers v. Milbert*,

¹⁴⁸ Talib v. Gilley, 138 F.3d 211, 212, 1214-215 (5th Cir, 1998). Retrieved from <https://cite.case.law/f3d/138/211/>

¹⁴⁹ Simmons v. Cook, 154 F.3d 805, 808-09 (8th Cir. 1998). Retrieved from <https://casetext.com/case/simmons-v-cook>

¹⁵⁰ Simmons v. Cook, 154 F.3d 805, 808-09 (8th Cir. 1998).

¹⁵¹ Berry v. Brady, 192 F.3d 504 (5th Cir. 1999), <https://caselaw.findlaw.com/us-5th-circuit/1450845.html>

¹⁵² Phelps v. Kapnolas, 308 F.3d 180,186 (2002), <https://casetext.com/case/phelps-v-kapnolas-2>

¹⁵³ Phelps v. Kapnolas, 308 F.3d 180,186 (2002)

(2003), had side effects from eating nutraloaf—vomiting, frequent bowel movements, burning in the chest and throat— after eating it for three days, which he stated as the basis for an Eighth Amendment violation.¹⁵⁴ The court ruled that the resulting conditions were not sufficiently serious, but, even if they were, there was no demonstration of deliberate indifference on the part of the defendants; therefore, there was no violation.¹⁵⁵ Prior to appeal, *Freeman v. Berge*, (2006), awarded \$50,000 in damages from denial of food to a prisoner, resulting in a 45-pound weight loss. On appeal, it was found that most of the denial of meals was self-inflicted, and there was “no evidence that he experienced real suffering, extreme discomfort, or any lasting detrimental health consequences,” and so held that the decision was reversed.¹⁵⁶

¹⁵⁴ Myers v. Milbert, 281 F. Supp. 2d 859, 865-66 (N.D.W. Va. 2003). Retrieved from <https://law.justia.com/cases/federal/district-courts/FSupp2/281/859/2494005/>

¹⁵⁵ Myers v. Milbert, 281 F. Supp. 2d 859, 865-66 (N.D.W. Va. 2003).

¹⁵⁶ Freeman v. Berge, 441 F.3d 543 (7th Cir. 2006). Retrieved from <https://caselaw.findlaw.com/us-7th-circuit/1312498.html>

CHAPTER SEVEN

SECTION B:

SYNTHESIS OF THE EIGHTH AMENDMENT FROM CASES

From what is depicted in decisions of cases, although food deprivation and restricted diets may be Eighth Amendment violations in some circumstances, it is the responsibility of the plaintiff to show that the defendants acted with deliberate indifference to a specific claim of harm. Without a demonstration of deliberate indifference through a subjective recklessness test, the claim falls short, even though the plaintiff has suffered the same as another case that could prove deliberate indifference. Deliberate indifference is the state of mind where one knows the outcome could be harmful, yet does an action anyway—entailing more than negligence.¹⁵⁷ Without a finding of this culpable In other realms of the criminal justice world, totality of the circumstances is sufficient to prove a claim, but with Eighth Amendment violations, the petitioner must detail a specific incident

¹⁵⁷ US Legal, Inc. “Deliberate Indifference Law and Legal Definition.” Deliberate Indifference Law and Legal Definition | USLegal, Inc. Accessed May 28, 2020. <https://definitions.uslegal.com/d/deliberate-indifference/>.

that caused sufficiently serious harm. The term sufficiently serious is a term that has no true test, so in most cases it is up to the judges to decide if the damages incurred were significant enough to constitute the level necessary to validate the claim.

In terms of allowing certain types of punishment over others, such as Nutraloaf over a bread and water diet, both of these in no way help to rehabilitate a prisoner. This punishment in itself will not help a prisoner become a functioning member of society again, so what is the point? The prisoner is already serving his punishment, so why impose a punishment using the mode of a basic need? Views of punishment have swayed back and forth and in the current time, using food as a punishment is seen as regulatory. But there could very well be a valid argument on it being retributive. It does not serve the purpose of punishment that was imposed with sentencing and could be seen as a mode to, for lack of better words, get-back at a prisoner who did not follow institutional rules.

Although interpreted on higher levels of decency, validation of claims on cruel and unusual punishment is harder to come about, with the majority of the cases related to food in prison being dismissed. This meaning that looking at cases, one can see how fewer claims are found to be valid even though they fulfilled previous or older guidelines for determining validity. So, the Eighth Amendment provisions that protect prisoners from prohibited acts of cruel and unusual punishment have many clauses to them with loopholes that allow for real violations to be considered invalidated claims. It seems that the protections instilled within the Eighth Amendment are oftentimes finagled enough to the point that the government actors are more protected than those that are in the care and custody of the government. Despite previous case holdings that required different proof of elemental matters, *Wilson* set the popular middle-ground where those claiming a violation

took place must show both an objective and subjective element.¹⁵⁸ In terms of objectivity, that would mean an act procures a specific result, harm in this case; whereas, subjectivity is more personal, and the prisoner must show the mind-state of the official that started the act.

It can be respected that courts allow the petitioner to show a violation through various tests; although, the courts could attempt to embrace the gray. When harm endured is obvious, despite the presence or lack of intent, courts should step outside of the ruling to determine a violation. Not everything in the judicial system is black and white, but the courts allowed these violations to occur in the first place. This is because courts rule in a hands-off manner, and the prison corporations know this. Refusing to decide on matters of policy within a prison sets the stage for the violations to happen. If there are inadequate resources to rule over prison corporations, that is something to think of when drafting contracts. Society cannot simply allow prison corporations to violate citizens' rights, and courts must put their foot in the door in order to get the corporations on a leash.

Government actors are held accountable for their actions in the Eighth Amendment. Privatized prisons are contracted out on behalf of the government to house and reform the incarcerated population. Following that line of thought, private prisons are acting on behalf of the government and should be held to the same standard. Therefore, when the prisons, or individuals acting on behalf of the prison violate prisoners' rights there should be the same accountability.

A new path for identifying an Eighth Amendment violations would encompass many of the same methods currently used. A slight change would be in determination of

¹⁵⁸ Wilson v. Seiter, 501 U.S. 294 (1991).

intent. As alluded to previously, intent does not equate with the severity of harm done. So regardless if an officer or agent of the government had the intent to cause the result, they still made the choice to deprive the prisoner of food. In that one choice, there would be enough intent to validate the claim in that sense. Instead of placing the burden of identifying the subjective mindset or indifference of the defendant onto the petitioner, a court could look at the one act and determine that a choice was made. Accountability needs to be prevalent when a population is in the care of another who essentially has free reign.

CHAPTER EIGHT

CLOSING REMARKS

Although the Eighth Amendment protects from cruel and unusual punishment, it only does so if a petitioner can prove through a display of subjective and objective components that have gotten harder over time to prove. This evolution of trying evidence partners with the ongoing public policy that increases incarceration, putting a greater number of people at risk of Eighth Amendment violations, with increasingly difficult elements to show validity. Not only that, but courts try not to get involved with the dealings of prisons, as they have their own way of running them. The majority of cases regarding food as punishment are dismissed, despite certain valid elements, partly due to this hesitancy to get involved. It could be related to the idea that major private prison corporations put money into the courts and other areas of law for their own benefit.

Moving on with the private prison industry, incidences that occur from lack of accountability and poor oversight are often dismissed with the opinion that missing a meal or two, or having a rotten meal or two will not affect health or well-being in a serious

enough matter. This only promotes the continuation of cutting corners by reducing cost, quantity, and quality of food at the risk of health of the incarcerated. Standards that vary depending on the prison affect incarcerated populations as there is no constant for methods of restricting diet or implementing Nutraloaf as punishment, which makes it harder to prove deliberate indifference on part of prison officials especially when whole institutions have qualified immunity.

The accumulation of factors that back up food as punishment create the idea that once in prison, a person is considered “less-than” and outside standards no longer have true foothold, as defined in codified minimum treatment standards. Being that it is increasingly harder to show violations in court, prisoners are stuck in a never ending cycle of poor treatment, with their claims falling on deaf ears. The reluctance to hold private companies accountable for their treatment of prisoners is an absolute failure of the justice system, no matter what currently passes as fine under the tests of the amendment. The illusory nature of the Eighth Amendment is only worsened when private prison industries have their say in the process and influence further processes. Since the prison industry and prison food industry have been privatized, government sectors just seem to be puppets to their puppet masters that help cut cost and increase profit, at the expense of prisoners, moving out of the way to allow the companies to rule in their own way.

In order to reform the prison system, one would need to address the issues with privatization and the contracts resulting from it. That is a core issue that could be amended by enforcing that the budget be spent on prisoners and not simply funneled to the pockets of the corporations. Corporations spend their profits on interest groups and politicians who want to increase the incarcerated population for their own benefit. Perhaps there needs to

be a policy reform that limits profits to a set amount, or else forces corporations to maintain their promise of efficiency. Food service is a child of the prison corporations so requiring standards be upheld throughout the corporations should benefit food service as well.

Looking at traditional definitions of punishment, one can see that they are outdated. Piggy-backing off of evolving standards of decency should be a quality that most of the realms of the criminal justice system should encompass. That being said, the definition of punishment should evolve with the times as well. Intent behind depriving food is a big factor in why many Eighth Amendment claims fall short. Yet, one could logically argue that choosing to deprive someone of food, not out of accident, is enough to show requisite intent surrounding the punishment. No one deprives someone of food for any reason other than harm or retribution. Retribution, being a goal of punishment, would depict that the deprivation was in fact a punishment. Now, depriving someone of food just for the harm included with such an act would be torturous. Torture is a violation of the Eighth Amendment. Thus, deprivation of food is a punishment that could be reasonably included in an Eighth Amendment violation claim.

There are many complexities within the statement of food being punishment, and it comes to mind that there should be a requisite level of harm done to constitute a violation. This is simply to evade the assertion that potential claims made under the newly recommended model are too frivolous. Using future research, one can determine the number of meals missed that starts to negatively affect a prisoner. Once that level is met, then the claim could be validated. In special circumstances, that level need not be met if harm done was presentable.

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